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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/776,648
Filing Date: February 10, 2004
Appellant(s): LEKOVIC ET AL.

Cary W. Brooks
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 8-29-08 appealing from the Office action
mailed 11-1-07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner.

The 1st two rejections under 35 USC 112 1st paragraph {identified as VII. A. and VII. B. by appellants} are withdrawn.

The rejection of claims 10-18 in the 3rd grounds of rejection under 35 USC 112 1st paragraph {identified as VII. C. by appellants} is withdrawn.

The rejection under 35 USC 112 2nd paragraph {identified as VII. D. by appellants} is withdrawn.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

4,673,696	TSAI	6-1987
2002/0121328	KURTH ET AL.	9-2002
6,803,390	LEKOVIC ET AL.	10-2004
6,699,916	LEKOVIC ET AL.	3-2004

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-9, 19-25 and 48-54 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to

reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Appellants' inserted limitation referring to a "non-biopolymer" contains subject matter that was described in the originally filed supporting disclosure. It is not seen where support for the instantly claimed polyol being defined as a "non-biopolymer" is provided for in the originally filed supporting disclosure. It has been held that the express exclusion of certain elements implies the permissible inclusion of all other elements not so expressly excluded which clearly demonstrates that the introduction of negative limitations not explicitly provided for by the specification as originally filed do, in fact, introduce new concepts and are therefore new matter. Ex parte Grasselli 231 USPQ 394. This is a new matter rejection.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-25 and 48-54 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsai (4,673,696) in view of Kurth et al.(2002/0121328).

Tsai discloses preparations of rigid polyurethane foams through employment of combinations of hydroxy functional acrylates and other polyols in reaction with

polyisocyanate components inclusive of alcohol-modified prepolymer packages prepared in the presence of blowing agents and catalysts inclusive of the tertiary amines (see abstract, column 2 lines 37– 59, column 3 line 60 et seq., column 4 line 51, and column 5 lines 8-11 and 27-49, as well as, the entire document). Blowing agents such as chemically active water are readily looked to and envisioned from the teachings of Tsai and are not seen as elements of distinction in the patentable sense. Further, the densities of appellants' claims are values associated with the selection and content of blowing agent and are seen to be readily envisioned from the teachings of Tsai as well.

Tsai differs from the instant claims in that prepolymers derived from the active hydrogen containing compounds as claimed are not particularly set forth. However, Tsai sets forth within his own disclosure the necessary polyols which would be looked to in the making of the prepolymers of appellants' claims (column 2 lines 33-59 and column 3 line 60 – column 4 line 25) and identifies that prepolymers may be used as isocyanates components (column 4 line 51 and column 5 line 8-11). Accordingly, it would have been obvious for one having ordinary skill in the art to have employed the polyols and hydroxy functional acrylates disclosed by Tsai as the modifying components in the making of the prepolymers of Tsai for the purpose of providing acceptable active hydrogen functionality in the facilitation of the realization of targeted formation of segmented structures within the practice of the preparations of Tsai in order to arrive at the products and processes of appellants' claims with the expectation of success in the absence of a showing of new or unexpected results.

Tsai further differs from appellants' claims in that hydrophobic bio-polymers such as the hydrophobic polyols of appellants' claims are not particularly utilized. However, Kurth et al. disclose the usefulness of polyols of such natural oils as soybean oils in the preparation of polyurethane foams for the purpose of deriving polyurethane products from renewable resources(see paragraph [0010] and [0012], as well as, the entire document). Accordingly, it would have been obvious for one having ordinary skill in the art to have employed the biobased polyols of Kurth et al. as the hydrophobic polyol in the work-up of the products of Tsai for the purpose of employing renewable reactants in deriving useful products in order to arrive at the products and processes of appellants' claims with the expectation of success in the absence of a showing of new or unexpected results.

The additional polyols of appellants' claims 51-54 are directed towards well known polyols from the urethane art useful for their well studied isocyanate reactive effect, and their employment for the purpose of imparting such reactive effects would have been well within the skill and obvious to one having ordinary skill in the art.

Claims 1-25, 48-54 are rejected under 35 U.S.C. 103(a) as being obvious over Lekovic et al.(6,803,390)&(6,699,916), each taken alone, in view of Kurth et al.

The applied reference has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art only under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome

by: (1) a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not an invention "by another"; (2) a showing of a date of invention for the claimed subject matter of the application which corresponds to subject matter disclosed but not claimed in the reference, prior to the effective U.S. filing date of the reference under 37 CFR 1.131; or (3) an oath or declaration under 37 CFR 1.130 stating that the application and reference are currently owned by the same party and that the inventor named in the application is the prior inventor under 35 U.S.C. 104, together with a terminal disclaimer in accordance with 37 CFR 1.321(c). This rejection might also be overcome by showing that the reference is disqualified under 35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(l)(1) and § 706.02(l)(2).

The Lekovic et al. patents disclose preparations of polyurethane foams through formation of isocyanate-terminated prepolymers derived from the reaction of isocyanate with hydroxy functional acrylates and other polyols followed by reaction of the prepolymer formed with additional polyols in the presence of catalyst and water as a blowing agent (see the documents in their entirety).

The Lekovic patents differ from appellants' claims in that hydrophobic biopolymers such as the hydrophobic polyols of appellants' claims are not particularly utilized. However, Kurth et al. disclose the usefulness of polyols of such natural oils as soybean oils in the preparation of polyurethane foams for the purpose of deriving polyurethane products from renewable resources (see paragraph [0010] and [0012], as well as, the entire document). Accordingly, it would have been obvious for one having

ordinary skill in the art to have employed the biobased polyols of Kurth et al. as the hydrophobic polyol in the work-up of the products of the Lekovic et al. patents for the purpose of employing renewable reactants in deriving useful products in order to arrive at the products and processes of appellants' claims with the expectation of success in the absence of a showing of new or unexpected results.

The additional polyols of appellants' claims 51-54 are directed towards well known polyols from the urethane art useful for their well studied isocyanate reactive effect, and their employment for the purpose of imparting such reactive effects would have been well within the skill and obvious to one having ordinary skill in the art.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-25, 48-54 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-22 of U.S. Patent No. 6,803,390 and claims 1-19 of U.S. Patent No. 6,699,916, each taken alone, in view of Kurth et al.

The claims of the Lekovic et al. patents disclose preparations of polyurethane foams through formation of isocyanate-terminated prepolymers derived from the reaction of isocyanate with hydroxy functional acrylates and other polyols followed by reaction of the prepolymer formed with additional polyols in the presence of catalyst and water as a blowing agent. The claims of the Lekovic et al. patents differs from appellants' claims in that hydrophobic bio-polymers such as the hydrophobic polyols of appellants' claims are not particularly utilized. However, Kurth et al. disclose the usefulness of polyols of such natural oils as soybean oils in the preparation of polyurethane foams for the purpose of deriving polyurethane products from renewable resources(see paragraph [0010] and [0012], as well as, the entire document). Accordingly, it would have been obvious for one having ordinary skill in the art to have employed the biobased polyols of Kurth et al. as the hydrophobic polyol in the work-up of the products of claims of the Lekovic et al. patents for the purpose of employing renewable reactants in deriving useful products in order to arrive at the products and processes of appellants' claims with the expectation of success in the absence of a showing of new or unexpected results. The additional polyols of appellants' claims 51-54 are directed towards well known polyols from the urethane art useful for their well studied isocyanate reactive effect, and their employment for the purpose of imparting

such reactive effects would have been well within the skill and obvious to one having ordinary skill in the art.

(10) Response to Argument

Appellants' arguments have been considered. However, rejections are maintained.

As to the rejection under 35 USC 112 1st paragraph, it is maintained that support for this term is not evident in appellants' originally filed supporting disclosure. The term "non-biopolymer" is a term that was formulated by appellants during prosecution of the instant application. As acknowledged by appellants, it lacks any literal support in the application as originally filed. Further, there is no evidence from appellants' originally filed supporting disclosure that support for this term is evident.

Appellants' supporting disclosure provides for "additional polyols" to be used and identifies polyols that may function suitably as these additional polyols. However, appellants' originally filed supporting disclosure does not identify that these additional polyols are particularly not biopolymers, nor do they set forth that the selected additional polyol be a non-biopolymer. Further, it is not seen that the suitable polyols identified by appellants' disclosure can or should be ascertained to be defining a group of polyols called "non-biopolymers". To this point it is held that the term "non-biopolymer" is not a term with a well known readily understood meaning that meaning can be inferred by its very recitation. Certainly, its meaning can not be interpreted, without being conveyed by appellants' originally filed supporting disclosure, to be the group of polyols identified

by appellants as "suitable" polyols to be used as "additional" polyols in the practice of appellants' invention.

Additionally, it is held and maintained that the holding of law set forth in the rejection above is at least relevant in the instant case because, as best as can be determined, appellants appear to be setting forth a negative proviso with the language "non-" being attached to the term "biopolymer". This attempt at the express exclusion of certain elements with the implied permissible inclusion of all other elements not so expressly excluded clearly demonstrates that the introduction of negative limitation not explicitly provided for by the specification as originally filed does, in fact, introduce new concepts and is therefore new matter. Despite appellants' assertions to the contrary, the originally filed supporting disclosure does not support appellants' attempt to limit their "second polyol" to all other second polyols that are "non-biopolymer".

As to appellants' arguments pertaining to the rejection over Tsai in view of Kurth et al., examiner holds and maintains rejection to be proper. It is maintained that motivation to combine the teachings of Kurth et al. with the teachings of Tsai et al. is evident. One looking towards the employment of more environmentally acceptable reactants in forming the preparations of Tsai would look to Kurth et al. towards the purpose of resolving such concerns.

As to appellants' arguments that the combined teachings are not sufficiently related, it is held that the determination that a reference is from a non-analogous art is

twofold. First, it is decided if the reference is within the field of inventor's endeavor. If it is not, then it must be determined whether the reference is reasonably pertinent to the particular problem with which inventor was involved. *In re Wood*, 202 USPQ 171, 174; *In re Clay*, 23 USPQ.2d 1058. {see also *In re Bigio*, 381 F.3d 1320, 72 USPQ2d 1209 (Fed. Cir. 2004) and M.P.E.P. 2141.01(a)}. Examiner holds and maintains that the polyurethane preparations of Kurth et al. meet the first criteria of being in appellants' field of endeavor by being directed towards polyurethane foams. Kurth et al.'s lacking of specific reference to "rigid" foams does not render the teachings non-analogous. The teachings are analogous for their shared concern of making polyurethane foams. Further, the claims' recitation of the term "rigid" without definition of degree of rigidity/flexibility does not serve as a limitation in the patentable sense without said further definition of degree being set forth in the claims. Further, beyond meeting this first criteria, it is seen that the secondary teaching of Kurth et al. is analogous art in that its teaching of solutions to employing renewable materials, inclusive of vegetable oils such as soybean oil, in forming polyurethane foams is at least reasonably pertinent to the particular problem with which appellant was involved, which is forming polyurethane foams from biopolymers, such as but not limited to castor oil, soybean oil, and the like.

As to appellants' arguments about the hydrophobicity of the polyols of Kurth et al. and what polyol materials are provided for by Kurth et al., examiner holds and maintains that such characteristics, to the degree required by appellants' claims, are intrinsic to the oil materials of Kurth et al., and selection of polyols meeting the

requirements of appellants' claims are met by the teachings of Kurth et al.

Oils by their nature are hydrophobic/water repelling. Kurth et al. in the primary concerns of its teachings is directed towards forming vegetable oil based polyols having selectable functionalities. Though it may be understood and accepted that hydroxyl group functionalization of the biopolymers of Kurth et al. would impart some degree of hydrophilicity to polyols formed, Kurth et al. identifies this to be a feature that is controllable in forming polyols of selectable functionalities (see again paragraph [0012]). This selectable functionality in polyols prepared is one of the advantages identified by Kurth et al. Although Kurth et al. does not specifically go into details of the effects on hydrophobicity and hydrophilicity arising from the manipulation of the functionalities of the polyols formed in their teaching, it is held that such a feature, which is intrinsically associated with the functionalization of these oil based materials, would also be variable and selectable.

Beyond this, however, examiner notes and maintains that Kurth et al. is not limited solely to the employment of the transesterified polyols of its primary concerns. Paragraph [0355], as well as, paragraph [0012] of Kurth et al. specifically identifies an alternative embodiment for their invention wherein a vegetable oil or a blown vegetable oils are employed as B-side components. Paragraph [0012] specifically identifies blown soya oil as a particular blown oil of mention. These materials of Kurth et al. are not merely recited as starting materials, but, rather, they are identified as reactants in polyurethane foam forming reactions as well. It is maintained that Kurth et al. discloses employment of reactive oils that function as polyols to the degree required by

appellants' claims.

Additionally, as to appellants' employment of the term "hydrophobic" in describing the biopolymer polyols of their claims, it is not seen that distinction based on this qualitative feature is made evident by appellants. It is maintained that the quality of being hydrophobic, hydrophilic or somewhere in between is a feature associated with the structural make-up of the materials involved. Accordingly, difference in appellants' claims is not seen to be evident based on the recitation of "hydrophobic" in describing the biopolymer polyols of appellants' claims without difference being identified in the make-up of the polyols being claimed. As to appellants' arguments concerning expectations of increased hydrophilicity arising from functionalization of the oil materials of Kurth et al., it is noted that appellants' own disclosure, including the soy polyols of their examples, contain hydroxyl functionality. It is not seen that the hydroxyl functionalities of the oils and oil based materials of Kurth et al. render these materials non-hydrophobic to a degree sufficient to distinguish appellants' claims over the combined teachings of the cited prior art.

As to appellants' arguments concerning amounts of the respective polyol components employed, it is maintained that it has long been held that where the general conditions of the claims are disclosed in the prior art, discovering the optimal or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233; *In re Reese* 129 USPQ 402 . Similarly, it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272,205 USPQ 215 (CCPA 1980). Variation in the amounts of these respective

reactive components for the purpose of controlling their reactive effects would have been within the skill of the ordinary practitioner in the art with the expectation of success, and appellants have not demonstrated new or unexpected results commensurate in scope with the scope of their claims associated with the selections and operation within the ranges of values of their claims. Tsai's examples disclose variation in amounts of polyols used in the isocyanate reactive component used in its preparation. Accordingly, variation in the content of respective isocyanate reactive component for purposes of manipulating their reactive effects is maintained to be an operation within the purview of the ordinary practitioner in the art. The relative amounts of polyol component employed are not a deficiency of appellants' claims that Kurth et al. is looked to in order to resolve. One looking to obtain the environmentally beneficial effects associated with employing the renewable polyols of Kurth et al. in place of petroleum based polyols employed in the preparations of Tsai would look to employ them in amounts provided for by Tsai's teachings.

As to appellants' arguments pertaining to the rejections over each of the Lekovic et al. patents in view of Kurth et al., examiner holds and maintains rejection to be proper. It is maintained that motivation to combine the teachings of Kurth et al. with the teachings of Lekovic et al. is evident. One looking towards the employment of more environmentally acceptable reactants in forming the preparations of Lekovic et al. would look to Kurth et al. towards the purpose of resolving such concerns.

As to appellants' arguments about the hydrophobicity of the polyols of Kurth et al.

and what polyol materials are provided for by Kurth et al., examiner holds and maintains that such characteristics, to the degree required by appellants' claims, are intrinsic to the oil materials of Kurth et al., and selection of polyols meeting the requirements of appellants' claims are met by the teachings of Kurth et al. As Kurth et al. is looked to in order to address this deficiency of the Lekovic et al. patents, the arguments set forth above pertaining to the rejection of Tsai in view of Kurth et al. will be repeated again below.

Oils by their nature are hydrophobic/water repelling. Kurth et al. in the primary concerns of its teachings is directed towards forming vegetable oil based polyols having selectable functionalities. Though it may be understood and accepted that hydroxyl group functionalization of the biopolymers of Kurth et al. would impart some degree of hydrophilicity to polyols formed, Kurth et al. identifies this to be a feature that is controllable in forming polyols of selectable functionalities (see again paragraph [0012]). This selectable functionality in polyols prepared is one of the advantages identified by Kurth et al. Although Kurth et al. does not specifically go into details of the effects on hydrophobicity and hydrophilicity arising from the manipulation of the functionalities of the polyols formed in their teaching, it is held that such a feature, which is intrinsically associated with the functionalization of these oil based materials, would also be variable and selectable.

Beyond this, however, examiner notes and maintains that Kurth et al. is not limited solely to the employment of the transesterified polyols of its primary concerns. Paragraph [0355], as well as, paragraph [0012] of Kurth et al. specifically identifies an

alternative embodiment for their invention wherein a vegetable oil or a blown vegetable oils are employed as B-side components. Paragraph [0012] specifically identifies blown soya oil as a particular blown oil of mention. These materials of Kurth et al. are not merely recited as starting materials, but, rather, they are identified as reactants in polyurethane foam forming reactions as well. It is maintained that Kurth et al. discloses employment of reactive oils that function as polyols to the degree required by appellants' claims.

Additionally, as to appellants' employment of the term "hydrophobic" in describing the biopolymer polyols of their claims, it is not seen that distinction based on this qualitative feature is made evident by appellants. It is maintained that the quality of being hydrophobic, hydrophilic or somewhere in between is a feature associated with the structural make-up of the materials involved. Accordingly, difference in appellants' claims is not seen to be evident based on the recitation of "hydrophobic" in describing the biopolymer polyols of appellants' claims without difference being identified in the make-up of the polyols being claimed. As to appellants' arguments concerning expectations of increased hydrophilicity arising from functionalization of the oil materials of Kurth et al., it is noted that appellants' own disclosure, including the soy polyols of their examples, contain hydroxyl functionality. It is not seen that the hydroxyl functionalities of the oils and oil based materials of Kurth et al. render these materials non-hydrophobic to a degree sufficient to distinguish appellants' claims over the combined teachings of the cited prior art.

As to appellants' arguments concerning amounts of the respective polyol

components employed, it is maintained that it has long been held that where the general conditions of the claims are disclosed in the prior art, discovering the optimal or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233; *In re Reese* 129 USPQ 402 . Similarly, it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272,205 USPQ 215 (CCPA 1980). Variation in the amounts of these respective reactive components for the purpose of controlling their reactive effects would have been within the skill of the ordinary practitioner in the art with the expectation of success, and appellants have not demonstrated new or unexpected results commensurate in scope with the scope of their claims associated with the selections and operation within the ranges of values of their claims. Lekovic et al.(see column 7 lines 26 and column 8 lines 56-67 for '916 & column 6 lines 15-16 and 55-58) provides for blends of polyols and provides specifics as to amounts for blends within their embodiments. Accordingly, variation in the content of respective isocyanate reactive component for purposes of manipulating their reactive effects is maintained to be an operation within the purview of the ordinary practitioner in the art. The relative amounts of polyol component employed are not a deficiency of appellants' claims that Kurth et al. is looked to in order to resolve. However, one looking to obtain the environmentally beneficial effects associated with employing the renewable polyols of Kurth et al. in place of petroleum based polyols employed in the preparations of Lekovic et al.'s teachings would look to employ them in amounts provided for by Lekovic et al.'s fully considered teachings.

Appellants' arguments pertaining to the obviousness-type double patenting rejections over the claims of each cited Lekovic et al. patent in view of Kurth et al. have been considered. Here it is maintained that one looking to obtain the environmentally beneficial effects associated with employing the renewable polyols of Kurth et al. in place of petroleum based polyols employed in the preparations of Lekovic et al.'s teachings would look to employ them as members of the polyols component of the claims of the Lekovic et al. ('916 & '390) patents, and variation in amounts for purposes of varying and balancing the environmentally beneficial effects of the employed biobased polyols of Kurth et al. would have been within the purview of the ordinary practitioner in the art.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

John M. Cooney, Jr.

/John Cooney/

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/James J. Seidleck/

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